DISSENTING VIEWS

While we support implementation of the recommendations of the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission"), we dissent from H.R. 10 because it does not accomplish that goal. The 9/11 Commission reached across the partisan divide and arrived at unanimous recommendations to improve the security of the United States. Ten members, five Democrats and five Republicans, held countless hearings and issued a well-written report with well-reasoned recommendations.[1] The Senate, almost evenly split between Republicans and Democrats, has taken up bipartisan legislation to implement those recommendations.

We had hoped the House would follow the example set by the Commission and by the Senate; instead, the Republican leadership has put before us this bill drafted only with Republican input and sponsored only by Republicans. Unfortunately, when Ranking Member John Conyers (D–MI) along with Reps. Jerrold Nadler (D–NY), Bobby Scott (D–VA), Sheila Jackson Lee (D–TX), William D. Delahunt (D–MA), and Adam Schiff (D–CA) reached across the aisle to offer the bipartisan Senate bill at the markup, it was rejected on a party-line basis.[2]

Because of the political nature by which it was drafted, it is no surprise that H.R. 10 is deeply flawed. First of all, it fails to incorporate numerous recommendations of the 9/11 Commission that would significantly advance our national security. For instance, H.R. 10 does not include Commission recommendations to provide strong budgetary authority for the newly-created National Intelligence Director, protect civil liberties through the creation of an effective civil liberties board, or address the need for congressional reform. As a matter of fact, in its present form, H.R. 10 fails to implement the vast majority of the 9/11 Commission recommendations—of the Commission's forty-one recommendations only eleven are fully implemented, sixteen are not implemented at all and fourteen are incomplete.[3]

At the same time, the legislation contains provisions not recommended by the Commission that would do little, if anything, to protect our homeland. Most notably, the legislation makes massive, anti-immigrant changes to our immigration laws (based in most cases on thin and tangential references in a Commission staff report that were not even included in the final report of the 9/11 Commission), and creates major new law enforcement and data

[1] National Commission on Terrorist Attacks Upon the United States, the 9/11 Commission Report (July 22, 2004) [hereinafter 9/11 Commission Report].

[2] Markup of H.R. 10, House Comm. on the Judiciary, 108th Cong., 2d Sess. (Sept. 29, 2004) [hereinafter H.R. 10 Markup].

[3] See Report Card on H.R. 10 prepared by Democratic Staff of the Select Committee on Homeland Security.

programs that significantly impairs our civil rights and civil liberties.

It is these very provisions that the 9/11 Commission has urged the House Republicans to drop from their legislative effort. The 9/11 Chairman stated recently that "We're very respectfully suggesting that provisions which are controversial and are not part of our recommendations to make the American people safer perhaps ought to be part of another bill at another time."[4] Vice Chairman Lee Hamilton specifically criticized the extraneous immigration provisions and stated, "we respectfully submit that consideration of controversial provisions at this late hour can harm our shared purpose of getting a good bill to the President before the 108th Congress adjourns."[5]

That is why H.R. 10, or provisions within it, are opposed not only by 9/11 Commission leaders[6] and the White House[7] but also organizations concerned with:

(1) state prerogatives (the National Governors Association[8] and the National Conference of State Legislatures[9]);

(2) the fair administration of justice (the American Bar Association ("ABA"),[10] the American Civil Liberties Union ("ACLU"),[11] the Association of the Bar of the City of New York[12]);

(3) the rights of immigrants (ACORN; American-Arab Anti-Discrimination Committee; American Jewish Committee; American Immigration Lawyers Association ("AILA"); Arab-American Institute; Center for Community Change; Fair Immigration Reform Movement; Hebrew Immigrant Aid Society; Lutheran Immigration and Refugee Service; National Asian Pacific American Legal Consortium ("NAPALC"); National Council of La Raza; National Immigration Forum; Service Employees International Union, AFL–CIO, CLC; and the Tahirih Justice Center)[13]; and

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[4] Jesse J. Holland, 9/11 Panel Urges House GOP to Drop Certain Parts of Bill, Assoc. Press, Sept. 30, 2004.

[5] Id.

[6] Carl Hulse, 9/11 Commissioners Say Bill's Added Provisions are Harmful, N.Y. Times, Oct. 1, 2004, at A13.

[7] Letter from Alberto R. Gonzales, Counsel to the President, The White House, to Editors of the Washington Post (Oct. 1, 2004).

[8] Letter from Raymond C. Scheppach, Executive Director, National Governors Association to the Honorable Thomas M. Davis, Chairman, and the Honorable Henry A. Waxman, Ranking Member, U.S. House Comm. on Government Reform (Sept. 29, 2004) [hereinafter NGA Letter].

[9] Letter from Maryland Delegate John Hurson, President of the National Conference of State Legislatures, and Illinois State Senator Steve Rauschenberger, President Elect of NCSL to the Honorable Thomas M. Davis, Chairman, and the Honorable Henry Waxman, Ranking Member, U.S. House Comm. on Government Reform (Sept. 28, 2004) [hereinafter NCSL Letter].

[10] Statement of Robert J. Grey, Jr., President, American Bar Association (Sept. 30, 2004) [hereinafter ABA Statement].

[11] Letter from Timothy H. Edgar, Legislative Counsel, American Civil Liberties Union, to Interested Persons (Sept. 23, 2004) [hereinafter ACLU Letter].

[12] Statement of Association of the Bar of the City of New York Regarding H.R. 10 (Sept. 30, 2004) ("We urge the House not to enact H.R. 10 and to provide a reasonable opportunity for broad public debate on its recommendations before taking any action.") [hereinafter ABCNY Statement].

[13] Letter from ACORN et al., to U.S. Representatives (Sept. 28, 2004) [hereinafter Immigration Sign-On Letter].

(4) adherence to international law (Amnesty International, Human Rights First, Human Rights Watch,[14] and the United Nations High Commissioner for Refugees[15]).

I. THE IMMIGRATION AND RELATED CHANGES ARE UNFAIR, UNFOUNDED, AND UNNECESSARY

A. THE LEGISLATION WOULD AUTHORIZE DEPORTATION TO COUNTRIES WHERE TORTURE IS LIKELY TO OCCUR

A primary concern with this legislation is that it would require our government to outsource torture, make it difficult for aliens to seek refuge from torture, and violate our international obligations. Section 3032, which was not recommended by the 9/11 Commission and is not supported by the President,[16] would retroactively exclude classes of aliens from protection under the United Nations Convention Against Torture ("CAT") by permitting the Department of Homeland Security to remove to state sponsors of torture any alien it reasonably believes may be a danger to the United States. The Association of the Bar of the City of New York notes that this provision "would * * * mandate the deportation of * * * an individual to a country even if it is certain that the individual would be tortured there."[17]

This provision also would make it more difficult to establish eligibility for CAT relief. Instead of being able to meet the present burden of proof, which is "more likely than not," the bill would require applicants to prove by "clear and convincing evidence" that they would be tortured if they are deported to the country from which they are seeking relief. Section 3032 also would prohibit federal court challenges to a decision removing CAT protection under the new law except as part of the review of a final order of removal.

The section 3032 exceptions permitting "extraordinary rendition" are in clear violation of our obligations under the Convention. Article 3 of the Convention absolutely forbids a State Party from forcibly returning any person to a country when there are substantial grounds for believing that the person would be in danger of being subjected to torture.[18] In fact, no less an authority than the United

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[14] Letter from Amnesty International, Human Rights First, and Human Rights Watch, to U.S. Representatives (Sept. 29, 2004) [hereinafter International Sign-On Letter].

[15] Letter from Kolude Doherty, Regional Representative, U.N. High Commissioner for Refugees, to the Honorable John Conyers, Jr., Ranking Member, U.S. House Comm. on the Judiciary (Sept. 29, 2004) [hereinafter UNHCR Letter].

[16] White House Letter:

> Yesterday's Washington Post inaccurately reported that the Bush Administration supports a provision in the House intelligence reform bill that would permit the deportation of certain foreign nationals to countries where they are likely to be tortured.
>
> The President did not propose and does not support this provision. He has made clear that the United States stands against and will not tolerate torture, and that the United States remains committed to complying with its obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Consistent with that treaty, the United States does not expel, return, or extradite individuals to other countries where the United States believes it is likely they will be tortured. Id. (emphasis in original).

[17] ABCNY Statement at 1–2.

[18] It is worth noting that, in ratifying the treaty, the U.S. Senate did not express any reservation, understanding, or proviso that might exclude a person from the Article 3 prohibition. Moreover, while the Convention prohibits sending them back to their home countries, the prohibition is country specific. It does not bar sending them to other countries. Also, although the grant of CAT protection is absolute, it is not permanent relief. It can be removed when the conditions in the home country change so as to eliminate the risk of torture.

Nations High Commissioner for Refugees has written of its concern that "the proposed exception to protection under the [CAT] will authorize the return of individuals to countries where they may suffer torture and will place the U.S. in violation of its international obligations."[19]

Regardless of the applicability of the CAT, we believe an absolute prohibition on removal to torture-practicing nations is necessary on moral grounds, as well. Torture is so horrendous and so contrary to our ethical, spiritual, and democratic beliefs that it must be condemned and prohibited. Returning someone to a place where he or she would be tortured would sustain the kind of system in which violent authoritarian regimes exist. Passing the section 3032 provisions would amount to legalizing the outsourcing of torture by the United States government. The President of the American Bar Association further indicated that extraordinary rendition may endanger "American troops who may be detained by adversaries who may be disinclined to honor international obligations in light of the U.S. government's failure to honor its own."[20]

We also object to the change in the burden of proof that would require the applicant to prove by "clear and convincing evidence" that he will be tortured. This is an unrealistic and unfair requirement. Raising the standard to this level of certainty would undoubtedly result in sending people to countries where they will be tortured. Moreover, it would violate Article 3 of the Convention, which forbids a State Party from forcibly returning a person to a country where there are "substantial grounds" for believing that he would be in danger of being subjected to torture.

Finally, we object to making such changes retroactive and prohibiting federal court review of CAT decisions unless it is part of the review of a final order of removal. Current law requires that petitions for review of a removal order be filed within 30 days.[21] Changing the standards and applying the changes retroactively puts individuals who have already won CAT relief in the position of reproving their cases with evidence that may no longer exist. These same individuals are likely to find themselves with no opportunity for federal court review of adverse decisions, which would eliminate the checks and balances that are the fundamental component of our democracy. This cannot be justified where the consequence of a mistake could be subjecting a person to torture.

These concerns are not merely hypothetical. In 2002, the United States deported Mr. Maher Arar, a Canadian-Syrian national, to Syria, a known state sponsor of torture.[22] Mr. Arar, now in Canada, was apparently tortured during his ten months in Syria. In another instance, a Virginia couple is suing the United States seeking to have their son, Ahmed Abu Ali, returned to the United States from Saudi Arabia, where he was arrested in June 2003; in their petition, the couple argue that their son's situation is an example of extraordinary rendition.[23]

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[19] UNHCR Letter at 4.
[20] ABA Statement.
[21] U.S.C. § 1252(b).
[22] Carlye Murphy, Va. Couple File Lawsuit to Free Their Son Held in Saudi Arabia, Wash. Post, July 29, 2004, at A8. Mr. Arar has sued the United States government for his ordeal.
[23] Id.

It is important to note that prohibiting the removal of someone to state sponsors of torture does not mean that they must be released. The Supreme Court has held that people who receive CAT protection can be held in detention if they pose a danger to the United States.[24] In response to the Court, the former Immigration and Naturalization Service promulgated regulations for determining the circumstances under which an alien may be held in custody beyond the statutory removal period.[25] Pursuant to the Court's decision and the INS regulations, it is clear that removal to state sponsors of torture is not necessary to fight terrorism.

The Convention Against Torture is a fundamental pillar of our human rights and national interest policy. It prohibits the government from establishing removal and extradition processes that would return aliens to countries where they would be tortured. It is one of the four primary international human rights documents. It stands, along with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Genocide Convention, as one of the cornerstones of our country's efforts to stop the most heinous forms of oppression and abuse. That is why we, and the leaders of the 9/11 Commission,[26] oppose this egregious proposal to weaken our enforcement of it.[27]

B. The Legislation Would Hinder Efforts to Grant Asylum to Victims of Torture

We oppose inclusion of section 3006 in H.R. 10 because it is not a part of the 9/11 Commission recommendations, and it would eviscerate protections built into the asylum process to ensure that the United States does not return genuine refugees to countries where they would face persecution and violate both the Refugee Convention and the Convention Against Torture. Section 3006 significantly expands the policy of expedited removal—a process that allows low-level immigration officials to remove undocumented foreigners without a hearing before an immigration judge. Before Congress has held hearings to assess the impact of this expansion of expedited removal, section 3006 would push the Department of Homeland Security to expand expedited removal to apply to all undocumented foreigners anywhere in the country unless they have been present in the United States for more than five years.

Under current law, expedited removal applies to non-citizens arriving at an airport or land border with invalid travel documents, and allows an immigration officer to order them removed without

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[24] In *Zadvydas* v. *Davis,* 533 U.S. 678 (2001), the Supreme Court held that the detention provisions in the Immigration and Nationality Act, red in light of the Constitution's demands, limit an alien's post-removal period detention to a period reasonably necessary to bring about the alien's removal from the United States. The Court found further that once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute except where special circumstances justify continued detention.

[25] 8 C.F.R. §§ 208.16–208.18. These regulations authorized the government to continue to detain aliens who present foreign policy concerns or national security and terrorism concerns, as well as individuals who are specially dangerous due to a mental condition or personality disorder, even though their removal is not likely in the reasonably foreseeable future.

[26] Carl Hulse, 9/11 Commissioners Say Bill's Added Provisions are Harmful, N.Y. Times, Oct. 1, 2004, at A13 ("Commission leaders did not specify all of the House provisions that they considered problematic, though they singled out a proposal to allow suspected terrorists to be deported to nations where they could be tortured.")

[27] The Majority rejected by a vote of 12–19 an amendment offered by Rep. Sheila Jackson Lee to strike section 3032.

further review unless they express a fear of persecution or torture. People who express a fear of persecution or torture are to be referred to an asylum officer for a "credible fear" interview, and must pass this interview in order to be eligible for asylum in the United States. The current statute also allows expedited removal to be applied to non-citizens who are found inside the United States without having been admitted or paroled and who cannot show that they have been here for more than two years. The current statute does not require such persons to be subjected to expedited removal, however, and gives the Secretary of Homeland Security the power to apply expedited removal to that group or to any sub-group of people within it. These existing provisions already place significant power in the hands of immigration officers whose decisions are not subject to formal administrative or judicial review.

Section 3006 goes much further and would allow DHS to summarily deport genuine refugees who have been in the United States for over a year, even if they qualify for a statutory exception to the one-year deadline to file for asylum without having their cases heard.[28] The expansion of expedited removal powers in section 3006 allows for summary deportation of immigrants who express a fear of persecution or an intent to apply for asylum but appear ineligible for asylum based on the one-year deadline. This bill ignores the fact that such applicants may fall under a statutory exception to the one-year deadline based on extraordinary circumstances or changed circumstances.[29]

Under section 3006, DHS would also summarily deport genuine refugees who are ineligible for asylum based on the one-year deadline but are eligible for withholding of removal under INA section 241(b)(3). Stripping refugees of the opportunity to claim that protection violates our obligations under Article 33 of the Refugee Convention. This is because even asylum applicants who file more than one-year after arrival and cannot qualify for an exception to the one-year deadlines should remain eligible for withholding of removal if they can show that they are refugees and would face a probability of persecution if deported. Withholding of removal is the basic minimum form of protection through which the United States ensures its compliance with its obligation under international law not to return refugees to countries where their lives or freedom would be threatened. If an immigration officer thinks an intending asylum-seeker has been here for more than one year but less than five, section 3006 does not provide for any investigation or review of the person's eligibility for withholding.

In addition to being a threat to relief for genuine refugees under asylum and withholding of removal, section 3006 would allow the return under expedited removal of non-citizens determined to have been in the United States for less than five years who would face torture when deported. This section provides no means for persons

[28] Section 208 of the Immigration and Nationality Act allows refugees present in the United States to file for asylum, but provides that they must do so within one year of their last arrival in the United States.

[29] A classic example of the latter would be where a person came to the United States as an economic migrant two years ago, but learned last month that following a coup in his country all his family had been killed due to their allegiance with the prior regime. This person's eligibility for an exception to the filing deadline needs to be considered by a trained asylum officer or an immigration judge. Under section 3006, it would never be considered at all.

subject to expedited removal who fear they will be tortured if they are deported to make an application for protection under the Convention Against Torture. The bill provides for referral to an asylum officer only for those who express an intention to apply for asylum or a fear of persecution. This omission sets the stage for very serious violations of the U.S.'s obligation under the CAT not to return people to countries where they would be tortured.

This massive expansion of expedited removal would also be likely to affect even more people than it seeks to target, because it is difficult for a person who has just been arrested by an immigration officer unexpectedly to prove that he or she has been in the United States for more than five years, or for less than one year so as to qualify for referral to an asylum officer. Most people who are present in the U.S. without admission do not walk around with five years' worth of rent receipts in their pockets. In the asylum context, proving one's date of entry typically takes some time and effort, and involves gathering documentation and witnesses-none of which can be accomplished in an expedited removal proceeding.

Finally, we do not believe that expanding the use of expedited removal in this way is the most efficient way to stop more terrorists trying to enter the United States. Expedited removal would not have stopped the terrorists who executed the 9/11 attacks. Moreover, expedited removal is the last option we ought to want as a defense against terrorists trying to gain entry, because essentially what it does is sends them out only to try to enter again somewhere else. The danger of relying on expedited removal to catch terrorists is that its focus is removal. Suspected terrorists should not be removed; they should be interrogated and charged.

Section 3007 is equally problematic. While current law already bars terrorists from seeking asylum, this section would allow genuine refugees to be denied asylum if they were unable to document relevant conditions in their countries through State Department reports, could not prove their persecutor's central motive for harming them, or had any inconsistencies between statements made to any U.S. government employees, whether written or oral and whether or not under oath, and there testimony before an immigration judge. There are key changes in this section that create insurmountable hurdles for individuals seeking safe haven in the United States.

Section 3007 would require an asylum applicant to prove that her persecutor's central motive in persecuting her was or would be her race, religion, political opinion, nationality or membership in a particular social group. While committing torture, rape, beatings, and other abuses, persecutors do not always explain themselves clearly to their victims. This is why the Board of Immigration Appeals has ruled that asylum applicants are not required to show conclusively why persecution has or will occur.[30] This bill would reverse that decision and place an enormous and unnecessary burden on asylum seekers by requiring them to prove with unrealistic precision what is going on in their persecutor's mind.

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[30] In Matter of S-P-, 21 I&N Dec. 486 (BIA 1996). The case involved a Sri Lankan who was tortured by his government purportedly to ascertain information about the identities of guerrillas and the location of camps, but also because of an unstated assumption by his torturers that his political views were antithetical to the government.

This section would permit adjudicators to deny asylum because the applicant is unable to provide corroborating evidence of "certain alleged facts pertaining to the specifics of their claim." This disproportionately harms applicants who are detained and/or lack counsel. In addition, section 3007 would bar judicial review of a denial of asylum based on an applicant's failure to provide corroborating evidence.

Section 3007 also introduces new credibility grounds for denying asylum, saying that the applicant's "demeanor" and other highly subjective factors may be determining factors in assessing credibility. Demeanor is highly cultural and should not be relied on as heavily as evidence.[31] Moreover, torture victims often have what mental health professionals call a "blank affect" when recounting their experiences, a demeanor that an adjudicator might misinterpret as demonstrating lack of credibility.

Additionally, it may be difficult for asylum applicants to recount their experiences, and even more troubling based upon the situation. Survivors of torture, such as rape, or forced abortion or sterilization may not be comfortable telling this information to a uniformed male inspection officer in an airport. Also, applicants in that setting may not be provided with appropriate interpreters. They may understandably fear discussing problems in their home countries in any detail until later in the process when it is made clear to them that they are not going to be sent back to their home countries without their claims being heard. Several courts of appeals even have emphasized that statements taken under such conditions are unreliable.[32]

Section 3007 also allows asylum to be denied for lack of consistency, including with any statement the applicant made at any time to any U.S. official. In order to escape persecution and flee to safety, refugees sometimes need to misrepresent why they are leaving one country and entering another. For reasons of fear, desperation, confusion and trauma they often do not tell the full story or, necessarily, the accurate story. To use an applicant's first statement to any U.S. official to impeach his or her sworn testimony, no matter how well supported, is unreasonable and unfair.

Furthermore, the Refugee Convention definition of a refugee, and its definitive interpretation in the United Nations High Commissioner For Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, do not require and in fact acknowledge that a person seeking refuge "may not be aware of the reasons for the persecution feared." To meet the test that persecution be "on account of" one of the prohibited grounds, it is sufficient to show persecution is motivated in part by one of those grounds. Asking a refugee or asylum applicant to parse his persecutor's motivations so finely as to distill the central motive is ask-

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[31] In one culture, looking a judge in the eye would be interpreted as candor, while in another it would be interpreted as contempt; downcast eyes might be interpreted as respect for authority in one culture and evasiveness in another.

[32] Fauyiza Kassindja, the young Togolese woman who fled female genital mutilation (FGM), would have been denied asylum under this standard with little chance of getting that determination reversed on appeal. Under current law, the Board of Immigration Appeals Appeals rightly reversed the Immigration Judge's credibility finding in her case, and that decision has helped protect other women fleeing FGM.

ing asylum seekers to read the minds of their persecutors. Moreover, current Supreme Court case law interpreting the "on account of" requirement is already the strictest in the world without section 3007.

Finally, section 3007 calls for consistency between the applicant's claim and country conditions in the country from which the applicant claims asylum "as presented by the Department of State." This provision could be interpreted to exclude country conditions information from human rights organizations, journalists, and myriad other sources of relevant and reliable information that are not necessarily included in State Department country reports. Although the State Department country reports are usually well researched, they are not an exhaustive and unfailingly accurate source of documentation of all of the wide range of human rights violations around the world that can give rise to valid asylum claims. In addition, since these reports come out annually, they can not be relied upon for documentation of more recent events.

The President has made many strong statements about his concern for the persecuted and America's role in creating a safe haven. On United Nations International Day in Support of Victims of Torture, he said:

> The United States reaffirms its commitment to the worldwide elimination of torture. * * * The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.[33]

In no uncertain terms, sections 3006 and 3007 are inconsistent with the Bush Administration's statements on persecution and torture and will lead to obvious and clear hardship on innocent and deserving immigrants.[34]

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[33] The President, Statement on U.N. International Day in Support of Victims of Torture (June 26, 2004).

[34] The effect of sections 3006, 3007, and 3009 are best illustrated through an actual asylum petition that would have turned out quite differently had sections 3006, 3007, and 3009 been in place. The findings of fact by the appellate court recount that Olimpia Lazo-Majano, a young Salvadoran mother of three, was 29, in 1981, when her husband fled El Salvador for political reasons. Ms. Lazo-Majano remained in El Salvador, working as a domestic. In mid-1982, Ms. Lazo-Majano was hired by a sergeant in the Salvadoran armed forces named Rene Zuniga. After Ms. Lazo-Majano had been working for him for several weeks, Zuniga raped her at gun point. This began a period of abuse during which Zuniga beat Ms. Lazo-Majano, threatened her, tore up her identity card and forced her to eat it, dragged her by the hair in public, held hand grenades against her head, and threatened to bomb her. Ms. Lazo-Majano felt trapped and powerless to resist Zuniga, because he accused her of being a subversive and threatened that if she reported him or tried to resist him, he would denounce her or kill her as a subversive. Ms. Lazo-Majano believed him: she knew a teen-age boy who was believed to have been tortured and killed by the army, the husband of a neighbor had been taken away at night together with a group of other men and killed the preceding year, and numerous young girls who had been raped with impunity.

In late 1982, Ms. Lazo-Majano escaped and fled to the United States, entering the country without inspection. Neither the Immigration Judge who heard her request for asylum nor the Board of Immigration Appeals doubted her credibility. But the Immigration Judge ordered her deported to El Salvador, and the BIA upheld that decision in 1985, on the grounds that "such strictly personal actions do not constitute persecution within the meaning of the Act." Ms. Lazo-Majano appealed to the federal court of appeals. The court of appeals reversed the BIA, holding that Zuniga "had his gun, his grenades, his bombs, his authority and his hold over Olimpia because he was a member" of an army unrestrained by civilian control, that his cynical imputation

Continued

C. THE LEGISLATION UNFAIRLY AND UNCONSTITUTIONALLY LIMITS JUDICIAL REVIEW OF EXECUTIVE ACTIONS

Section 3009 would eliminate virtually all federal court review of orders of deportation, including claims arising under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment. Review of such orders would be limited to "circuit courts of appeals of constitutional claims or pure questions of law raised upon petitions for review filed in accordance with this section."

The bill not only forecloses habeas corpus review in those cases where a "petition for review" is barred under section 242(a)(2) of the Immigration and Nationality Act—it goes much further by redefining "judicial review" and "jurisdiction to review" throughout the INA to include review by habeas corpus. This is a radical departure in immigration law because it changes the longstanding, historical meaning of "jurisdiction to review" and "judicial review"—"terms of art" that have been long interpreted in immigration matters as distinct from review by writ of habeas corpus.[35]

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to her of subversive political opinions, and the danger that he would kill her or have her killed on this basis, qualified her for asylum.

In its decision, the court of appeals in this case noted reports that people being denied asylum and deported from the United States to El Salvador had been tortured and killed. Fortunately for Ms. Lazo-Majano, her deportation was stayed pending the federal court's review. Under section 3009 of H.R. 10, however, the court could not have stayed Ms. Lazo-Majano's deportation unless she were able to show by "clear and convincing evidence"—before briefing or argument in this legally complex asylum case—that execution of the deportation order would be "clearly contrary to law." This is a higher standard than she was required to meet to actually win her asylum case before the court of appeals. Under H.R. 10, Ms. Lazo-Majano would have been deported to El Salvador. The federal court's decision in her favor two years later would do nothing to protect her there.

If section 3007 of H.R. 10 had been law, this case would almost certainly not have been decided in Ms. Lazo-Majano's favor. Section 3007 would require her to establish that she was the wife of someone who fled the country for political reasons, that her persecutor attributed "subversive" political opinions to her, and that his desire to stamp out any resistance to his dominance over her as a man and an officer in the ruling army, were not only the motives of Zuniga's persecution, but that her political opinion was "the central motive" for the persecution. A dissenting judge on the court of appeals in this case took the view that Ms. Lazo-Majano was "abused * * * purely for sexual, and clearly ego reasons" and was therefore not eligible for asylum. If this case were decided under the rule of section 3007, that view would have prevailed.

In fact, if H.R. 10 had been the law, Ms. Lazo-Majano would have been unlikely to have had her asylum claim heard at all—by anyone. Section 3006 expands expedited removal procedures to require the summary deportation, without hearing or review, of anyone who has not been admitted or paroled into the United States and (in the judgment of an immigration officer) has not been physically present in the United States continuously for the past five years. Ms. Lazo-Majano was present in the United States without admission when she was stopped by an immigration officer. Section 3006 provides that a person in this situation who indicates an intention to apply for asylum or a fear of persecution shall be referred to an asylum officer for a credible fear interview. Ms. Lazo-Majano would be allowed to apply for asylum if she was able to tell a uniformed Border Patrol officer (an uniformed and likely male officer) about her fears, but even if she felt safe enough to do that she would only be granted a credible fear interview if the officer determined that she had been present in the United States at that point for less than a year.

In fact, Ms. Lazo-Majano had only been in the United States for a few months when she was stopped. But could she have proved that? She was an undocumented immigrant with no proof of her date of entry and probably very limited documentation of her life in this country. If she had in fact been in the U.S. for over a year, she might have been eligible for an exception to the one-year filing deadline for asylum claims—many refugees who have been through the kind of shattering, traumatic experiences she suffered arrive in the U.S. suffering from psychological and/or physical ills that make it impossible for them to file their claims timely. For many victims of rape and other forms of torture, the continuing feeling of shame and fear are so overwhelming that they may not be able to bring themselves to tell their stories to any other person—much less a U.S. government official—until they have gained some sense of security. People in this situation are often eligible for an exception to the filing deadline under INA section 208(a)(2)(D). Section 3006 would prevent their claims from being heard. Regardless of her date of filing, Ms. Lazo-Majano would be eligible for withholding of removal under section 241(b)(3) of the INA, but section 3006 makes no provision for application for withholding of removal.

[35] *INS* v. *St. Cyr,* 533 U.S. 289, 312 n.35 (2001).

This section would redefine the meaning of these terms to explicitly forbid access to the "Great Writ" for all claims where "judicial review" or "jurisdiction to review" is barred, dramatically altering at least thirteen separate provisions of the Immigration Act that affect agricultural workers, asylum petitioners, non-immigrants and others. In these cases, habeas review must be available as a safety valve. The Constitution demands court review for all actions that affect the liberty of persons detained by the government.

After barring these claims, the legislation explicitly bars the federal courthouse doors to any alternative appeal through the "Great Writ" of liberty. In so doing, the bill violates the Constitution, which provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended" except in cases of "Rebellion or Invasion."[36] The Supreme Court has held that the Constitution requires any substitute remedy for habeas corpus to be "neither inadequate nor ineffective to test the legality of a person's detention."[37]

This proposal ignores many of the other systemic problems that have led to necessary habeas litigation. The current system makes it very hard for many people to get any review, even if they have a strong claim. Factors negating meaningful review include the lack of access to counsel, detentions in remote areas, lack of notice on how to have a claim heard in court, exceedingly short time limitations to file petitions for review, no protection against deportation during the short time to file for review, and the government's use of hypertechnical arguments to defeat jurisdiction. These factors, plus the 1996 legislation's effective elimination of discretionary relief by the agency, have forced people into habeas litigation. The Majority rejected an amendment offered by Rep. Nadler and Rep. Linda Sanchez (D–CA) to strike this objectionable proposal.

D. THE LEGISLATION WOULD REGULATE FORMS OF IDENTIFICATION CONTRARY TO CONGRESSIONAL AND PRIVATE SECTOR VIEWS

The legislation contains problematic provisions that would make it difficult for immigrants to carry identification and open bank accounts, and for states to regulate drivers. Considering that these measures would not help in the war on terror, it is not surprising that they were not recommended by the 9/11 Commission.

First, section 3005 would prohibit federal employees from accepting any foreign identity document other than a passport.[38] The underlying objective is to prevent Mexican immigrants from using Matricula Consular cards for identification. The Government of Mexico has been issuing Matriculas at their consulates around the world for more than 130 years. The consulates do this to create an official record of its citizens in other countries. The Matricula is legal proof of registration with a consulate. This registration facilitates access to protection and consular services because the certificate is evidence of Mexican nationality. Last year alone, more than a million of these cards were issued to Mexican citizens living in

[36] U.S. CONST. art. I § 9.

[37] Swain v. Pressley, 430 U.S. 372, 381 (1977).

[38] The identity document issue would come up when aliens are required to present a foreign identity document to enter a federal building or to board an airplane at a United States airport. In addition, the Transportation Security Administration requires passengers to show an identification card before being admitted to the secured areas of an airport.

the United States. It does not provide immigrant status of any kind, and it cannot be used for travel, employment, or driving in the United States or in Mexico. The Matricula only attests that a Mexican consulate has verified the individual's identity.

The Matricula also has some non-consular uses. For instance, because it is an identification card, it provides Mexican nationals in the United States with access to banking services. Without an acceptable identification card, many Mexican nationals in this country cannot open checking or savings accounts or use any other banking services. The significance of this cannot be overstated; in 2003, Latino immigrants sent $38 billion to Latin America.[39] Moreover, the U.S. banking industry has been supportive of the Matricula, planning to spend at least $8.5 billion through 2005 to attract Hispanic customers.[40]

The availability of banking services is a safety issue, as well. Because of perceptions that Latinos do not have bank accounts and thus carry large amounts of cash, Latinos are more likely to be victims of violent crime than any other racial or ethnic group. As a result of this problem, mayors across the country support the use of the Matricula to enable Latinos to use mainstream financial institutions and thus reduce crime and violence.[41]

Finally, the use of the Matricula for establishing bank accounts has been approved by our government. The USA PATRIOT Act requires regulations setting forth minimum standards for financial institutions that relate to the identification and verification of any person who applies to open an account.[42] These regulations, promulgated by the U.S. Department of Treasury, permit banks to accept identification cards issued by foreign governments from customers opening new accounts, including the Matricula.[43] Additionally, the House recently defeated another attempt to ban the use of the Matricula.[44] Despite this clear support for the Matricula, opponents of the identification card are trying to achieve their objective indirectly by limiting which foreign documents can be accepted.

Section 3052 of the legislation is another thinly-veiled attempt to limit forms of acceptable identification. Subsection 3052(c)(2)(B) would prohibit states from accepting any foreign document, other than an official passport, to meet the documentary identification

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[39] Dr. Manuel Orozco, Institute for the Study of International Migration, Georgetown Univ., Pew Hispanic Center Report: The Remittance Marketplace-Prices, Policy and Financial Institutions 15 (June 2004).

[40] Holders of the Matricula are more likely to use regulated financial institutions, such as banks or credit unions, than a money transmitting business such as Western Union or MoneyGram because the cost of making such transfers is much higher for the latter category.

[41] See Rachel L. Swarns, Old ID Card Gives New Status to Mexicans in U.S., N.Y. Times, Aug. 25, 2003, at A1 ("In June, the mayors of the Indians cities of Fort Wayne, East Chicago, Columbus and Indianapolis announced they would accept the Matricula card. In July the State of Indiana and the cities of Madison, Ind., and Cleveland and Columbus in Ohio recognized it. This month, Cincinnati followed suit. Officials say the move would be a boon to local economies, encouraging Mexican immigrants to pour money into banks and businesses. They also say immigrants with bank accounts will be less vulnerable to criminals who prey on people who carry cash or keep money at home.").

[42] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107–56, § 326, 115 Stat. 272, 317 (2001).

[43] See 31 C.F.R. § 103.121 (2004).

[44] H.R. 5025, 108th Cong., 2d Sess. (2004). An amendment offered by Rep. Michael Oxley striking section 216, which prevented issuance of regulations regarding Matricula Consular cards, passed the House by a bipartisan vote of 222–177.

requirements for a state-issued identification card (including a drivers' license).

While proponents of this measure have linked driver's licenses to security concerns by pointing out that many of the 9/11 hijackers were able to obtain licenses, we would note that making it more difficult to obtain a driver's licenses will not deter terrorism. Even requiring passports to obtain driver's licenses would not have prevented the 9/11 hijackers from getting driver's licenses; they all had passports.

Beyond the ineffectiveness of the proposal, it also would serve to exclude millions of people from American society and hinder state efforts to regulate drivers. Recent estimates indicate that we have between eight and fourteen million undocumented aliens in the United States, many of whom may not have passports and would be prevented from obtaining licenses under the legislation. The reality is that in many parts of the country it is virtually impossible to survive in our society without a car, and it is unlikely that undocumented aliens will simply give up and leave the country when they learn they cannot obtain licenses.

Moreover, a license is not just a privilege for the driver's benefit but also serves state purposes. By licensing drivers, the state can ensure that the drivers who receive licenses have acceptable driving skills, know traffic laws, and have liability insurance. In addition, registering and photographing all drivers helps the state to monitor driving records.

Finally, denying access to licenses could pose a safety risk. Traffic accidents are the leading cause of death, with forty-four thousand traffic fatalities in 2002.[45] According to a study conducted for the AAA Foundation for Traffic Safety, unlicensed drivers are five times more likely to be in fatal crashes than drivers with valid licenses.[46]

E. THE LEGISLATION CONTAINS OTHER OBJECTIONABLE PROVISIONS THAT WOULD NOT ENHANCE SECURITY AND WERE NOT RECOMMENDED BY THE 9/11 COMMISSION

1. The legislation increases criminal penalties for false claims to citizenship without any nexus to national security goals

We object to section 3086, which imposes five years imprisonment for making false claims to citizenship for the purpose of entering or remaining in the United States. This is yet another example of the mean-spirited, anti-immigrant sentiment that pervades this bill. Many immigrants, both legal and undocumented, may make such a claim upon an encounter with a law enforcement or immigration official. We believe that a five year jail term for such a statement is unnecessary and very counterproductive. Federal law already exacts severe consequences on immigrants who make false claims to citizenship. There is no valid policy reason for making taxpayers bear the high cost of jailing an immigrant for five years for such a minor non-violent offense.

Making a false claim to citizenship is already punishable under the Immigration and Nationality Act (INA). Section 212 makes an

[45] National Safety Council, Injury Facts: Report on Injuries in America (2003).
[46] AAA Foundation for Traffic Safety, Unlicensed to Kill: The Sequel (Jan. 2003).

alien who falsely represents themself as a citizen inadmissible, and there is no waiver of the consequences of this offense.[47] In addition, this offense constitutes a crime of moral turpitude and triggers removability from the country under section 237 of the INA.[48] The INA makes a person who has committed a crime of moral turpitude subject to mandatory detention in jail, if they are convicted of a sentence of more than 1 year in prison.[49] This immigration detention, which can last for years, normally follows the service of a criminal sentence in prison.

Section 3086 needlessly piles on additional jail time to an immigrant who already faces removal, with mandatory detention in many cases. Upon deportation, the immigrant would be barred from the United States for life.[50] The consequences of one false statement, both to the immigrant and to their family, community and employer, are already severe. Adding a five year jail term to someone who is already subject to deportation, without possibility of return under our federal laws, is grossly excessive to the crime.

Furthermore, the 9/11 Commission did not recommend the enhancement of this penalty, nor did it recommend anything remotely related to this policy. The Majority on this Committee justifies the inclusion of this policy[51] in this bill by the Commission's recommendation that "The Department of Homeland Security, properly supported by Congress, should complete, as quickly as possible, a biometric entry-exit screening system, including a single system for speeding qualified travelers."[52]

Jailing people for five years for claiming that they are U.S. citizens has nothing to do with a biometric entry-exit system, nor with speeding the transit of qualified travelers. There is no indication that a policy like this would catch terrorists trying to enter the country, or prevent a terrorist attack. In fact, none of the September 11th terrorists claimed U.S. citizenship to enter this country.

This policy is simply an anti-immigrant provision designed to punish, jail and deport immigrants, especially those who are undocumented. It has no nexus to national security and is most likely to result in years of imprisonment followed by the eventual deportation of random immigrant workers. We object to this penalty, and certainly oppose its inclusion in this bill, which is supposed to be responding to the recommendations of the 9/11 Commission.

2. The legislation would hinder business and tourism travel throughout the western hemisphere

Another provision of the bill would hamper travel throughout the western hemisphere and cause chaos for businesses and national economies. Section 215(b) of the Immigration and Nationality Act states that, unless otherwise provided, it is unlawful for U.S. citi-

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[47] 8 U.S.C. § 1182(a)(6)(C)(ii).
[48] 8 U.S.C. § 1227(a)(2)(A)(i).
[49] 8 U.S.C. § 1226(c)(1)(B).
[50] See Section 212 of the INA. An inadmissible person is not eligible to get a visa to return to the United States.
[51] Memorandum from the Honorable F. James Sensenbrenner, Jr., Chairman, U.S. House Comm. on the Judiciary to Members, U.S. House Comm. on the Judiciary 16 (Sept. 27, 2004) (regarding the Markup of H.R. 10, the "9/11 Recommendation Implementation Act" and other bills).
[52] 9/11 Commission Report at 389.

zens to depart from or enter the United States unless they bear a valid U.S. passport. By regulation, the Secretary of State has provided that U.S. citizens are excepted from this requirement when traveling directly between parts of the United States, and when traveling between the United States and any territory in North, South or Central America (i.e., the western hemisphere).[53]

Section 3001 of H.R. 10 would amend section 215(b) to invalidate the western hemisphere exception, thus requiring a passport to travel to and from currently exempted countries. It would permit the President to waive the passport requirement for travel to Canada and Mexico, but it would require such travelers to carry documents that the Secretary of Health and Human Services has designated as establishing U.S. citizenship for the travel purposes.[54]

As it is has been proposed, the measure would overburden passport processing operations and slow business and tourism travel to a halt. First, though it essentially would require the issuance of new passports for travelers to currently exempted countries, the legislation provides no funding to increase passport application processing. As such, the need for so many passports could result in severe backlogs and prevent people from taking needed trips. Further, it would have a particularly negative impact on the tourism industry of the Caribbean, which relies on U.S. travel of those without passports. For this reason, the provision would raise the ire of the travel industry and many businesses who would miss opportunities because they could not engage in last minute travel.[55]

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[53] 22 C.F.R. § 53.2(a)–(b). Cuba is excluded from the western hemisphere exception. Id.

[54] The Secretary would have 60 days to pass an interim rule and publish a list of qualifying documents in the Federal Register. As of 90 days after that publication, the President would not be authorized to permit citizen arrivals or departures without the designated document or documents.

[55] Another concern we expressed during the markup is that it does not limit the use of secret immigration proceedings. During the Committee markup, Reps. Howard Berman (D–CA) and Delahunt (D–MA) offered an amendment to set out guidelines for government closure of hearings in immigration court in response to the blanket closure of these hearings by the Chief Immigration Judge in the weeks following the September 11th attacks. We feel that this amendment falls squarely within the recommendations of the 9/11 Commission. Specifically, the Commission recommended that: "The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use." The amendment offered by Rep. Berman would have created guidelines for the use of the government's power to close hearings.

On September 21, 2001, Chief Immigration Judge Michael J. Creppy issued a memorandum ("Creppy Directive") implementing an order from the Attorney General to close certain immigration hearings. These cases were to be conducted completely in secret with "no visitors, no family and no press." The mandate for secrecy even prohibited "confirming or denying whether such a case is on the docket or scheduled for hearing."

It has been reported that the INS did not use classified information in any of these hearings. Instead the government has asserted that all purported terrorism-related proceedings need to remain closed in order to protect the privacy of the detainees and prevent information about government intelligence-gathering methods from reaching al Qaeda.

The U.S. District Court for the Eastern District of Michigan found that the order closing immigration hearings was unconstitutionally broad (*Detroit Free Press* v. *Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), and the Federal Court of Appeals for the Sixth Circuit affirmed. *Detroit Free Press* v. *Ashcroft,* 303 F.3d 681 (6th Cir. 2002). In a separate case the U.S. District Court for New Jersey found the closures unconstitutional (*New Jersey Media Group* v. *Ashcroft,* 205 F. Supp. 2d. 288 (D.N.J. 2002), but the Third Circuit reversed (*New Jersey Media Group* v. *Ashcroft*, 308 F.3d 198 (3rd Cir. 2002). The Supreme Court declined to hear the cases, effectively allowing the government to continue the process, at least within the geographic confines of the Third Circuit.

Open proceedings, in judicial and quasi-judicial settings, protect individuals from arbitrary action and the public from sloppy decision-making. Transparent proceedings are also important in maintaining public confidence in the fairness of government activities. There are clearly individual cases where proceedings should be closed to protect the safety of participants or national

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II. THE LEGISLATION WOULD AUTHORIZE THE FEDERAL GOVERNMENT AND PRIVATE EMPLOYERS TO INTRUDE INTO THE EVERYDAY LIVES OF AMERICANS

A. THE LEGISLATION VIOLATES PRIVACY RIGHTS AND FEDERALISM BY STANDARDIZING DRIVER'S LICENSES TO CREATE A NATIONAL IDENTIFICATION CARD.

We object to Title III, Subtitle B, Chapter 1, which provides new standards for drivers' licenses and identification cards.[56] This provision goes far beyond the Commission's recommendations. It comes dangerously close to creating a national identification card system. It threatens American citizen's rights to privacy. It violates the tenets of federalism and forces unfunded mandates on the states. It excludes important stakeholders from the policy-making process and ignores state policy needs. It marginalizes immigrants in America, and ignores more reasonable alternatives for securing personal identification documents.

In its final report, the 9/11 Commission issued the following recommendation:

> Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers [sic] licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity

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security. But the Creppy Directive allows the partial closing of proceedings based on the government's prerogative, without any showing of legitimate security needs.

As of May 29, 2002, 611 individuals have been subject to one or more secret hearings. As noted, there is a split in the circuit that have considered the legality of these proceedings, and, in opposing review by the Supreme Court, the Justice Department announced it was reconsidering its policy. Brief for the Respondents in Opposition at 13, North Jersey Media Group (No. 02–1289). But, in the absence of legislative action, there is nothing to prevent the Justice Department from conducting more secret immigration hearings in the future.

The amendment offered by Mr. Berman responds to the Administration's decision to require blanket closure of immigration proceedings without any showing of legitimate security needs by the government. The amendment would have established a statutory presumption of openness for removal hearings while preserving the possibility that a hearing may be closed upon a specific showing of need. Namely, the amendment would create an exception that on a case-by-case basis, hearings may be closed to preserve confidentiality of the immigrant (as in asylum adjudications or cases involving minors), to protect national security if classified information is involved, or to protect the identity of a confidential informant.

During the markup, the Chairman of the Subcommittee on Immigration opposed the Democratic amendment claiming that "it is common today for immigration cases to be closed. In fact, all asylum proceedings and proceedings regarding inadmissibility of a particular applicant are closed today." This statement is false. In making this argument, the Subcommittee Chairman's staff pointed to two sections of the Code of Federal Regulations stating that "All hearings, other than exclusion hearings, shall be open to the public * * *" (8 C.F.R. § 1003.27) and "Exclusion hearings shall be closed to the public." 8 C.F.R. § 1240.32. These provisions apply only to exclusion hearings—proceedings that commenced prior to April 1, 1997. The do not apply to all inadmissibility hearings, as the Subcommittee Chairman claimed. To the contrary, all asylum and removal proceedings are presumptively open to the public. There are limited exceptions. For example, hearings can be closed by the court when the proceeding involves an abused alien spouse or child or if information presented in the hearing is subject to a protective order.

It is unfortunate that the Majority members of the Committee were misinformed by their Subcommittee Chairman. We would hope that without this misinformation, our colleagues would have joined us in reinstating a transparent and open system for our immigration hearings that provides safeguards to protect privacy, classified information, national security, and confidential informants.

[56] Specifically, this language is found in Sections 3051 through 3056. Although we oppose Chapter 1 of this Subtitle, we do not object to Section 3054, which makes it illegal to traffic actual document authentication features, in addition to false authentication features.

to ensure that people are who they say they are and to check whether they are terrorists.[57]

After discussing the importance of continuing to welcome immigrants and keeping track of who enters the country, the Report also noted, "All but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud."[58] The hijackers used licenses and IDs to rent cars, conduct other activities to enact their plan, and eventually board aircraft for the 9/11 attacks. Clearly, the Commission recommended the establishment of identification standards to ensure that terrorists could not traverse the country and conduct business transactions in furtherance of future domestic attack plans.[59]

The 9/11 Commission's recommendation is broad and gives Congress room to work with federal agencies and states to develop standards that can be applied nationwide. Yet this Chapter goes far beyond the Commission's recommendation that the federal government set standards for identification. It requires the states to overhaul their procedures for issuing driver's licenses and identification cards to meet Federally-proscribed standards. It requires that states establish a database system for sharing all of the personal information and driving histories on license and ID card holders, though the Commission did not recommend any type of unified database for this data. The Commission did not suggest that the Federal government should interfere with states' prerogatives or the privacy rights of individuals.[60] Nor was there a suggestion that Federal grants to the states should hinge on a shared database agreement as proposed in H.R. 10. This Chapter also forces states to bear all of the financial costs of these new standards by failing to fund these mandates. The proposal in H.R. 10 goes well beyond the Commission's recommendation and unnecessarily violates the privacy rights of citizens and residents.

Section 3052 establishes minimum standards for Federal recognition of state-issued driver's licenses or identification cards. It requires, at a minimum, that the following information be included on the identity documents: full legal name; date of birth; gender; license or ID card number; photo; residential address; signature; security features to prevent fraudulent use or tampering; and a common machine-readable technology with defined minimum data elements.

Section 3052 also spells out what forms of information and proof a state must require before issuing a license or ID: a photo identity

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[57] 9/11 Commission Report at 390 (emphasis added).

[58] Id.

[59] See comments of 9/11 Commission Vice Chair Lee Hamilton at Oversight Hearing on Privacy and Civil Liberties in the Hands of the Government Post-September 11: Recommendations of the 9/11 Commission and the U.S. Department of Defense Technology and Privacy Advisory Committee Before the Subcomm. on Commercial and Administrative Law of the House Committee on the Judiciary, 108th Cong., 2d Sess. 97 ("Just to let you know our concern here, all of these hijackers, except one, had U.S. identification. And what we are saying is that secure identification is very, very important in terms of counterterrorism. And we—we did not endorse a national ID * * * Keep in mind that these hijackers were extremely skillful in being able to find the gaps in our system. And we are trying to protect against that as best we can.")

[60] See Statement of Vice Chair Lee Hamilton and Commissioner Slade Gorton, National Commission on Terrorist Attacks upon the United States, Before the Subcommittee on Commercial and Administrative Law and the Subcommittee on the Constitution of the House Committee on the Judiciary, p. 3. (August 20, 2004) [Hereinafter Hamilton and Gorton Statement]. ("Individual rights and liberties must be adequately protected in the administration of the significant powers that Congress has granted to executive branch agencies to protect national security.")

document or alternative with legal name and date of birth; a document with date of birth; proof of social security account number; and a document with name and address of principal residence. The states must verify each document with the original issuing agency, and they are prohibited from accepting any foreign documents, except an official passport, for these purposes.

Furthermore, section 3052 requires states to use digital technology, retain copies or images of documents; require facial image capture for driver's license issuance; establish a procedure to verify information for renewals; confirm the accuracy of social security numbers and take action if one is registered to another person; refuse to issue licenses without confirmation that the applicant has terminated their license from another state; secure licensing facilities and employees authorized to manufacture or produce them; and establish fraudulent document recognition training.

The National Governors Association "strongly opposes" these provisions in H.R. 10.[61] They note that the bill was "drafted without any input from Governors" and "exclude[s] states from the standard-setting process despite states' historic roles as issuers of driver's licenses and other identification data."[62] In their opinion, the bill "would impose unworkable technological standards and verification procedures on states, many of which are well beyond the current capacity of even the federal government." They oppose the requirement that they share their state information with the federal government. In their view, this proposal would "create financial, administrative and implementation problems by requiring state compliance with these unprecedented, federally-imposed standards within a short timeframe." In addition, "the cost of implementing such standards for the 220 million driver's licenses issued by states represents a massive unfunded federal mandate."[63] We agree with their assessment and share their concerns.

As written, this Chapter would require state departments of motor vehicles to verify each and every identification document used to prove identity, by confirming the document with the government agency or company that issued it. Without a well-developed cooperative approach, this will become a bureaucratic nightmare that will be costly to the states and will cause substantial delays for citizens and residents. H.R. 10 also fails to provide any protections for the digital data it requires states to store digitally. There are no limits on how it may be used, nor is there any guidance for maintaining data security. This bill even goes as far to make the appearance of the IDs uniform—a step that is eerily close to a national ID card.

The states have a right to participate in determining how features for licenses and ID cards should be changed. Despite their expertise, they had no role in developing the requirements in H.R. 10. In effect, this Chapter empowers the Federal government to usurp state control over licensing and identification and establishes the equivalent of a national identity card with different state names on them.

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[61] NGA Letter.
[62] Id.
[63] Id.

Drivers' licenses are not simply identification documents. Their purpose is to ensure that people are safe drivers, who know the traffic laws and have defensive driving skills, before they drive on our roads and highways. Licensing also makes it possible for drivers to have liability insurance to protect other drivers on the road. The states should maintain their critical role in the issuance of licenses. Their obligation to ensure safety on their roads to protect their residents and visitors should not be ignored.

Perhaps the objections raised by the National Conference of State Legislatures ("NCSL") best enunciate the concerns we share with the states about the imposition of these standards and the obligation to share the data of state residents:

> These provisions show no respect for federalism. They constitute egregious unfunded mandates dealing with drivers' licenses, birth certificates, personal identification cards and use of social security numbers that are likely to impose billions in costs on states. They preempt and undercut state legislative authority through a federally-contrived rulemaking process. They set a prescriptive framework for a national identification card. They ignore efforts made in every state to strengthen the integrity of drivers' licenses issuance and verification. They surrender legislative prerogative to federal agencies and bureaucrats without the benefit of congressional oversight. They constitute the groundwork for potentially compromising civil liberties and individual privacy. They compel state participation in compacts that are not recognized by state lawmakers and elected officials. They reference a federal grant process and funding of 'sums as may be necessary,' all in an environment of bulging federal deficits and constraints on domestic discretionary spending.[64]

Title III of H.R. 10 proposes a computerized national database of every American driver's license and state identification card under the guise of strengthening our homeland security. Section 3053 requires that states must agree to participate in an interstate compact for the electronic sharing of driver license data, known as the "Driver License Agreement," in order to receive any grants or assistance under the bill. It requires state motor vehicle databases contain (1) all data fields printed on driver's licenses and identification cards issued by the state, and (2) motor vehicle drivers' histories, including motor vehicle violations, suspension, and points on licenses. A mega-datebase such as this one represents a perilous threat to our Constitutional rights. By forcing state governments to maintain and share files on almost every adult in the state, H.R. 10 will truly usher in the era of a "Big Brother" government.

Past efforts to establish a national ID card to identify and track U.S. residents have failed, due to the threats they pose to our liberty.[65] H.R. 10 seeks to achieve that same purpose through the

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[64] NCSL Letter. In addition to the provision on driver's licenses and state identification cards, the letter referred to provisions on birth certificates and social security data in Title III, Subtitle B, Chapters 1, 2, and Section 3071 of Chapter 3 from H.R. 10.

[65] See Alison M. Smith, Congressional Research Service, National Identification Cards: Legal Issues, n. 1–3 (Jan. 3, 2003). Examples include the Immigration Reform and Control Act of 1976,

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back door. Instead of creating a new national ID card, whose data would be held and monitored by the Federal government, this proposal standardizes state ID cards so that they achieve the same purpose. In this proposal, the states maintain the data, but they are forced to create a mega-database whose data must be shared by all 50 states and the U.S. territories.

There are no privacy limitations on the use of this data.[66] The bill does not prevent the sharing of this information with other people, companies, Federal government agencies or foreign governments that may make inquiries. There are no systems for maintaining the datashare systems, ensuring the accuracy of the data, preventing fraud and tampering, making corrections, or filing complaints for inaccuracy or misuse of the data. Currently, some states do not even have accurate or complete databases. Not all states can verify whether or not a certain person has a valid driver's license from their state. Certainly the Federal government should not mandate linking up state databases when some states cannot provide reliable information about their license and ID holders.

The lack of data safeguards ensures that the data will often be inaccurate and misused. There will be serious consequences for untold numbers of people who may miss flights, land in jail, fail to get benefits or be denied other opportunities due to database errors.

As noted above, the system proposed in this Chapter will dangerously increase the Federal government's ability to monitor individuals. The data-sharing system is bound to be subject to unauthorized disclosures and leaks. During World War II, for example, supposedly sacrosanct census data was used to identify Japanese-Americans for internment.[67] This mega-database will be a tempting target for future legislation and policies. The FBI could use this database to identify certain immigrants or members of an ethnic group for "voluntary interviews".[68] Collection agencies and states could erroneously identify people as unpaid debtors or child support evaders. People might be identified through the database because they criticized the President for U.S. involvement in a war or protested an international organization for the ills of globalization. The system is ripe for abuse and misuse that will violate people's rights to privacy, speech, and civil rights.[69]

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which stated, "Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card." Pub. L. 94–571. Similarly, Rich Thornburg, Attorney General for President George Bush, ruled out identification cards for the use of guns in 1989, feeling that it was "an infringement on rights of Americans." See Alison M. Smith, Congressional Research Service, National Identification Cards: Legal Issues n.2 (Jan. 3, 2003) (citing Ann Debroy, "Thornburg Rules out Two Gun-Control Options," Wash. Post, June 29, 1989 at A 41). Finally, Representative Dick Armey has been quoted as saying "[w]e didn't beat back the administration's plan to issue us all 'health security cards' only to have Congress adopt an I.D. card to track down immigrants." Id. (citing William H. Minor, Identity Cards and Databases in Health Care: The Need for Federal Privacy Protections, 28 Columb. J.L. & Soc. Probs. 253,273 (1995)).

[66] *See* Hamilton and Gorton Statement, p.1 ("We also recognize that with the enhanced flow of information comes a need to establish guidelines and oversight to make sure that the privacy of our citizens and residents is respected and preserved.")

[67] H.R. Rep. No. 104–469, 104th Cong., 2d Sess. pt. 1, at 520 (1996)

[68] For example, in late 2001 and 2002, the FBI conducted a program of "voluntary interviews" of over 5000 Muslim residents of the U.S., seeking information related to the September 11, 2001 attacks and terrorist threats to the United States. Similar interviews of Iraqi residents in the U.S. were conducted prior to the initiation of the war in Iraq in 2003.

[69] See Hamilton and Gorton Statement at 2 ("We did propose a general test to be applied to consideration of the renewal of other provisions of the USA PATRIOT Act, and we believe that principle should also be applied to other legislative and regulatory proposals that are designed

Combined with other sections of H.R. 10 that prevent or limit the use of other forms of identification,[70] track the movement of Americans in and out of the country,[71] standardize state records for birth certificates, and set up computerized systems for state and federal sharing of birth and death records,[72] the impact of this proposal for driver's licenses and state-issued ID cards is truly frightening.[73] America would become a place where a person's every move, every encounter with state or federal governments from birth to death, would be tracked and monitored by those governments. H.R. 10 is a major leap forward in creating an all-intrusive "Big Brother" government.

Section 3055 empowers the Secretary of Homeland Security to make grants to the states to assist their efforts to conform to the minimum standards in this chapter. It authorizes such sums as may be necessary to carry out the Chapter from fiscal years 2005 through 2009. However, there is no guarantee that these grants will be made to all states and territories, or that sufficient funds will be provided to cover the massive expenses of these reforms. Furthermore, the demand for state compliance is not contingent upon the provision of federal funding to meet the costs of these reforms. The result will likely be a large unfunded mandate upon the states.[74] Yet many states continue to struggle financially as a result of other federal budget cuts in recent years. How will they pay for this plan? If these measures are needed for our national security, they should be paid for with federal funds. The burden of imposing and sharing these mandatory standards should not rest with the states.

Section 3056 gives the Secretary of Homeland Security the authority to make regulations, certify standards and issue grants under this title, in consultation with the Secretary of Transportation and the States. This gives ultimate authority to DHS, all but removing the Department of Transportation from the process, despite their authority over federal highways, their impact over State road and highway policy, and their experience working with states on road safety and licensing policies. At a minimum, the Secretary of Transportation should share the authority to implement this Chapter by making regulations, certifying standards and issuing grants in conjunction with the Secretary of Homeland Security. As discussed below, Rep. Linda Sanchez (D–CA) offered a substitute that would have achieved this balance. Under her proposal, the Secretaries of Transportation and Homeland Security would have joint authority to ensure that road safety policy was considered along with homeland security needs in creating and implementing these new standards.

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to strengthen our security but that may impinge on individual rights. The test is a simple but important one: The burden of proof should be on the proponents of the measure to establish that the power or authority being sought would in fact materially enhance national security, and that there will be adequate supervision of the exercise of that power or authority top [sic] ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.")

[70] See H.R. 10 § 3005.
[71] See id. § 3001.
[72] See id. § 3061.
[73] See NCSL Letter.
[74] See NGA Letter.

We would also note that this policy would leave citizens vulnerable to immigrant drivers on the roads without licenses. Many undocumented aliens who do not have passports are going to drive whether they have driver's licenses or not. Preventing the states from issuing driver's licenses to these aliens will result in a lot of untested, uninsured drivers on the roads. As a number of immigration organizations noted, "Not only would these requirements grind to a halt the issuance of driver's licenses throughout the country, they also would lead to a de facto immigration status requirement. Such a result would severely undermine the law enforcement utility of the Department of Motor Vehicle databases by discouraging individuals from applying for licenses." [75]

Rep. Sanchez did offer a Democratic substitute to this Chapter at the Full Committee mark-up that Republicans defeated in a 19 to 12 vote.[76] Her proposal would have satisfied the recommendation of the 9–11 Commission, while bringing all those who have a serious interest in the implementation of standards together. She proposed creating a working group of federal and state experts who would carefully determine standards that would both ensure the security of driver's licenses and state identification cards and meet the policy needs of the States. This working group would include officials from the Department of Transportation, the Department of Homeland Security, and State motor vehicle departments. The working group would have reported their findings to Congress, allowing us to make a more reasoned decision that met the objectives of all stakeholders.

Although the substitute amendment failed, Rep. Melvin L. Watt (D–NC) expressed bi-partisan concerns about how to improve driver's license security and the risks of imposing a national identification card:

> Mr. Watt: "I just wanted to point out that we had a hearing in the Commercial and Administrative Law Subcommittee on this whole national identification process. And uniformly—and I wish my Chairman Mr. Cannon, was here to express this—but uniformly the people on the—members on that subcommittee were extremely concerned about how this new identification system got implemented. And I think the underlying bill is well beyond what any of those people would have thought would have been a desirable place to be, and I think Ms. Sanchez's amendment gets us much, much closer to the appropriate balance." [77]
>
> Mr. Watt: Quoting Mr. Cannon from the subcommittee transcript: "'And I suspect that this subcommittee, perhaps the Constitution subcommittee in addition, is going to have a lot to say about how we at least approach that problem.' He's talking about the national ID card problem. 'And I think that means a commission where people who are very thoughtful, who have significant background, and who are'—'people who are willing to say we don't necessarily need to federalize this process. And if we do federalize this process, it shouldn't just be by the damn feds sucking information out of local folks, It

[75] Immigration Sign-On Letter.
[76] H.R. 10 Markup at 317–332.
[77] H.R. 10 Markup at 322.

ought to be the local folks who get something back, and to do that, you ought to have some kind of protection, maybe an anonymizer. * * * It is vital to America and it is, I think, the cornerstone of what our grandchildren are going to enjoy or suffer in the future."[78]

We agree with the 9/11 Commission that drivers' licenses and identification cards should be secure and should not be easily obtainable by terrorists, as was the case before September 11, 2001. However, creating a national ID is not the answer. All of the States and relevant federal agencies should have a role in carefully constructing appropriate national standards. A rigid, federal mandate is unwise and places unreasonable expectations on the states. This is especially true when the federal mandate is not funded, as in this case.

Most importantly, this proposal does not strike an appropriate balance between our rights to individual privacy and the federal government's responsibilities to enhance our national security. We can improve the screening of card applicants, enhance the security of the identification cards, and ensure that driver's meet safety tests. This can be done without violating individual privacy, creating a database with information on almost every U.S. resident, and increasing the number of dangerous, uninsured drivers on American roads and highways. It is our obligation to find the right balance. Rushing into a bad policy that establishes a "Big Brother" government database that will soon move beyond our control is not the answer. There is no evidence that the 9/11 Commission ever suggested or contemplated such a sweeping, overbroad policy to achieve the objective of securing domestic identification. Individual privacy must and can be protected while we improve our national security. Alternative reforms could successfully achieve this balance.

B. THE LEGISLATION WOULD PROVIDE UNFETTERED ACCESS TO INACCURATE AND INCOMPLETE CRIMINAL BACKGROUND INFORMATION ON EMPLOYEES

The bill also would subject private citizens to widespread dissemination of any criminal history information, regardless of accuracy. As reported from the Committee, section 2142 authorizes private employers to obtain background information, however inaccurate, on potential employees from the Attorney General. This program would undo the careful balance that exists between security needs and privacy interests and could lead to the dissemination of incorrect and private information.

Under current law, the Attorney General is authorized to acquire, collect and classify information for the purpose of criminal identification and records, the identification of deceased individuals and the location of missing persons.[79] This information may only be exchanged with federal government, the states, cities, and penal and other similar institutions.[80]

Section 2142 would expand this authority significantly. It would create a pilot program that would empower private employers to

[78] Id. at 326.
[79] 28 U.S.C.§534.
[80] Id. §534(a)(4).

access federal databases when such a search would be legal under state law. It requires the Attorney General to set up a system by which this information can be reliably accessed by fingerprint or other biometric identifiers. The search requester will be provided with an identifying description of the individual, and all available history on arrests, detentions, indictments or other formal charges. The requester also would receive any available dispositional information on the aforementioned, such as acquittal, sentencing, correctional supervision and release information. The Attorney General would then be required to submit a report regarding how a background program might be applied to the general public. Section 2142 also creates a program by which security guard companies may check potential employees' backgrounds.

While we understand the need for ensuring the integrity of, this measure would not be of benefit in that regard. We believe that a study must proceed a actual program, not follow it. In the four months of its operation, the pilot program envisioned by the bill's proponents could collect information on countless innocent Americans. We cannot support such a program for many reasons.

First, the program exceeds the scope of the 9/11 Commission report. It is unclear how this provision even relates to terrorism at all that it is not limited to those who work in national security-related positions or even those who work for the government. Plainly, there is no justification for allowing waitresses, accountants, cooks, and construction workers to be subjected to a federal background check through this bill. That is precisely whey states that allow discrimination based on criminal history require some nexus between the position and the relevance of one's criminal past. For example, many states regulate the employment only of those who work in law enforcement, or with the children or the elderly.[81] To create a blanket check for people regardless of the sensitivity of their jobs muddies what this bill intends to do—prevent future terrorist attacks—and jeopardizes our privacy.

Second, there are not safeguards to protect the information that employers collect and submit. The legislation contains no guidelines for what to do with information one it has been given to the Justice Department. It does not regulate what officials, public or private, would have access to it. Further, it does not provide whether the information is destroyed after the criminal history check or whether it remains in some new database of average Americans who have done nothing more than apply for a job. During the markup, the majority was forced to acknowledge that the legislation does not address these issues.[82]

Beyond our concerns about what the Justice Department would do with its new boon of personally-identifiable data, there are concerns about the lack of regulations for employers. Section 2142 is silent about what employers are required to do to protect their em-

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[81] Amy Hirsch, Center for Law and Social Policy, Every Door Closed: Barriers Facing Parents With Criminal Records 15 (2002).

[82] H.R. 10 Markup.

Rep. Jackson Lee (D–TX): "I ask do you know, under the pilot program, what would happen to those fingerprints of all these individuals who would be subject to the criminal history background check?

Rep. Steve Chabot (R–OH): "It's not been set up yet, so the details of this ultimately will be determined."

ployees' and applicants' sensitive information. There also are no provisions for ensuring that the background checks are actually being requested by bona fide employers instead of merely persons seeking private information on relatives or business competitors.

Third, the provision has no safeguards for accuracy. The Brandon Mayfield fiasco [83] demonstrates how easy it is to misidentify someone, even through our criminal and fingerprint databases. Despite this fact, the legislation does not require the database to have any level of accuracy before allowing information to be shared so that Mr. Mayfield's ordeal is not repeated. Beyond misidentification, it is possible that the files may be incomplete because they may not hold all of the dispositional information of how an arrest or charge was resolved. For this reason, the Justice Department should not disseminate arrest records until it can demonstrate that it also will disseminate acquittals, mistrials and those situations where charges were dropped.

This provision invites unwarranted discrimination against those with criminal pasts. The Equal Employment Opportunity Commission has found that discrimination on the basis of criminal history can very well be a violation of Title VII under a disparate impact theory, and should only be allowed when proven that it is a business necessity.[84] It has further stated that arrest records can be particularly troublesome, and that an arrest absent a conviction should very rarely ever be a justification for not hiring an applicant.[85] Finally, even the President has admitted the importance of integrating past offenders into our society, such as to reduce recidivism.[86] The legislation's new criminal history checks will just invite more discrimination against those who have reformed their lives, those whose convictions are far in the past, even those who were arrested, but never convicted, of a crime, and make it harder for them to reintegrate into society.

Finally, we would note there are no meaningful limitations whatsoever on the scope or duration of the pilot program. Ordinarily, when a pilot program of this magnitude is created, Congress will limit the program's geographic or other scope or duration. No such limitations are set forth in this legislation, effectively giving the Attorney General carte blanche authority to develop a program that could intrude on our civil liberties and privacy.

While we support background checks for security guards we cannot support background checks for the myriad of other positions that have no security or terror relation whatsoever. To include such a measure in an anti-terrorism bill is misleading and jeopardizes

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[83] The FBI held Brandon Mayfield for two weeks in connection with the Madrid train bombing. The FBI held Mr. Mayfield on the basis of a fingerprint on a bag with detonators near the bombing, despite the fact that the Spanish government had questioned the FBI's identification of Mr. Mayfield. The FBI eventually released and apologized to Mr. Mayfield for its mistake.

[84] Equal Employment Opportunity Commission, Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987).

[85] Policy Guidance on the Consideration of Arrest Records in Employment decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Sept. 7, 1990).

[86] The President, State of the Union Address (Jan. 20, 2004) ("Tonight I ask you to consider another group of Americans in need of help. This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year, $300 million prisoner re-entry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.").

what the 9/11 Commission recommended as real fixes for the terrorist threat. Unfortunately, the majority rejected an effort to limit the scope of the checks to security employees and to study the possibility of further expansion.[87]

C. THE LEGISLATION WOULD AUTHORIZE THE GENERATION OF TRAVEL DATABASES AND SCREENING PROGRAMS WITHOUT REGARD TO ACCURACY

Another concern with the legislation is that it would permit the development of travel databases and screening programs but would not ensure the integrity of those records. Section 2173 directs the Assistant Secretary of Homeland Security to begin testing a next generation passenger prescreening program, and directs the Secretary to establish procedures by which a person can appeal their position on a no-fly list.

While few can dispute the need for passenger screening, such measures must be done properly. At least hundreds, if not thousands, of airline passengers have complained to the Transportation Security Administration that their names incorrectly appear on TSA no-fly lists; in July 2004 alone, two-hundred and fifty people sought to have their names removed from such lists.[88] We believe the ability to remove oneself from a no-fly list is such a basic right for every American that it should receive the government's highest attention.

Unfortunately, the Department of Homeland Security has been operating the no-fly list for over two years since the attacks and has not seen fit to implement a process by which a passenger may remove his or her name.[89] Two persons who have appeared on the list, Rep. John Lewis (D–GA) and Sen. Edward M. Kennedy (D–MA) attempted in vain to correct the problem; Rep. Lewis was able to avoid being flagged by adding his middle initial to travel bookings while Sen. Kennedy spent three weeks getting TSA officials to remove his name.[90] This lack of commitment to civil liberties by the government begs the intervention of an independent body that is focused on more than just security.

It also is important that there be judicial review of the no-fly process, such that the public would have a means of challenging any unfavorable rulings by the government. H.R. 10 however, does not permit review and leaves any challenges to be decided by the very organization that categorized the individual as a security risk in the first place. It has taken far too long for such a process to be implemented.

To that end, Rep. Jackson Lee offered an amendment at the Committee markup that would have put the onus on the legislation's newly-created Civil Liberties Protection Officer to create this program.[91] The amendment also would have ensured that no-fly

[87] By a vote of 11–20, an amendment by Rep. Sheila Jackson Lee (D–TX) to remove the pilot program was defeated. See H.R. 10 Markup.

[88] Sara Kehaulani Goo, Hundreds Report Watch-List Trials, Wash. Post, Aug. 21, 2004, at A8.

[89] The Transportation Security Administration, an agency within the Homeland Security Department, recently announced the testing phase of its new Secure Flight program. 69 Fed. Reg. 57,345 (Sept. 24, 2004). The notice makes only a vague reference that "TSA will establish comprehensive passenger redress procedures and personal data and civil liberties protections for the Secure Flight program." Id.

[90] Id.

[91] See H.R. 10 Markup.

list criteria would be based on reliable evidence that an individual is a known or suspected terrorist instead of on constitutionally-protected activity. Finally, the amendment would have provided a civil remedy to enforce the removal process in court. Unfortunately, the Majority rejected these widespread concerns and defeated the amendment.[92]

Another provision in the bill, section 3081, contains shortcomings similar to those in section 2173. It directs the Secretary of State to study the feasibility of creating a database recording the lifetime travel history of U.S. citizens and foreign nationals. This provision goes far beyond the recommendations of the 9/11 Commission and unnecessarily intrudes on the privacy of Americans.

In its final report, the 9/11 Commission wrote, "Targeting travel is at least as powerful as a weapon against terrorists as targeting their money. The United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility.[93] Note that the Commission recommended targeting terrorist travel—not creating a master database of the travel history of innocent Americans. Contrary to this recommendation, the program in H.R. 10 would generate a history of even non-terrorist travel.

We have two primary concerns, and the first is for the privacy of all who use our commercial air space. The Majority has not explained how having a record of every flight that every American has ever taken will reduce the terrorist threat.

Our second concern is that the program would collect information on everyone, regardless of whether they are a threat, or even suspicious, and the vast amount of data reflecting innocent behavior will obscure the truly threatening activity. As many advocacy groups have noted, refining the tracking process—not expanding it—will make preventing terrorist entry into the United States more efficient.[94]

D. THE LEGISLATION FAILS TO ADEQUATELY CREATE A BOARD TO PROTECT CIVIL LIBERTIES

We also believe the legislation fails to establish a civil liberties board that could adequately protect our rights. Chief among the recommendations of the 9/11 Commission was the establishment of a government wide watchdog to safeguard civil liberties. The Commission found that currently "there is no office within the government whose job it is to look across the government at the actions we are taking to protect ourselves to ensure that liberty concerns are appropriately considered."[95] The Commission recognized, however, that both "the substantial new powers [vested] in the investigative agencies of the government"[96] by the USA PATRIOT Act, as well as its own recommendations calling "for the government to

[92] The amendment was defeated by a vote of 12–18.
[93] 9/11 Commission Report at 385.
[94] Immigration Sign-On Letter at 2.
[95] 9/11 Commission Report at 395.
[96] Id. at 394.

increase its presence in our lives,"[97] require that "should be a voice within the executive branch"[98] to address civil liberties concerns.

Surprisingly, H.R. 10 as introduced did not create a government wide civil liberties board. Instead, the bill only designated a single civil liberties officer for the intelligence community. To remedy this flagrant omission, Rep. Watt, along with Reps. Nadler and Schiff, offered an amendment that would have established a strong, independent, bipartisan agency within the executive branch.[99] After hours of negotiation, the Chairman introduced a substitute amendment that represents the product of bipartisan compromise in all save one respect. The Chairman's amendment stripped the proposed board of administrative subpoena power.[100]

Although we believe that H.R. 10 as amended is improved by the establishment of a Civil Liberties Board, we are deeply concerned that without the necessary authority to receive and evaluate relevant data concerning the privacy and civil liberties implications of anti-terrorism efforts the Board will be nothing more than a toothless tiger. Even worse, we run the risk of not only creating a Board that is useless and ineffective, but one whose uninformed findings will nevertheless put forward the illusion of civil liberties oversight.

The need to ensure that a Civil Liberties Board possesses adequate authority to perform its duties is reflected in each major bill introduced to implement the recommendations of the 9/11 Commission. For example, the McCain/Lieberman bill, S. 2774, establishes a five-member Privacy and Civil Liberties Oversight board within the Executive Office of the President (EOP).[101] Similarly, S. 2845, the Collins/Lieberman bill also provides for the establishment of a five-member Privacy and Civil Liberties Oversight board within the EOP. Both bills contain a provision authorizing the Board to issue a subpoena when necessary to carry out its duties.

The duties of a civil liberties board, as contemplated by the 9/11 Commission, makes access to information critical to its success. The civil liberties board is established to safeguard our constitutional freedoms as we develop new tools for gathering and sharing information to prevent and combat terrorism. In introducing S. 2774, Sen. McCain said:

> All of us who are concerned with threats to this Nation's security also wish to ensure that our efforts to protect Americans do not infringe on our civil liberties. After all, giving up the way of life we have fought so hard to defend

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[97] Id. at 393.

[98] Id. at 395.

[99] At the request of Chairman Sensenbrenner, Rep. Watt withdrew the amendment to negotiate the scope of the proposed Board's powers and the parameters of its access to relevant information.

[100] The authority to issue a subpoena in the Watt-Nadler-Schiff amendment is identical to that in S. 2774. The provision reads in pertinent part:

> (g) ACCESS TO INFORMATION.—
> (1) AUTHORIZATION.—If determined by the Board to be necessary to carry out its responsibilities under this section, the Board may—
> (D) require, by subpoena, persons other than Federal executive departments and agencies to produce any relevant information, documents, reports, answers, records, accounts, papers, and other documentary or testimonial evidence.

The Watt/Nadler/Schiff amendment imposed the additional requirement that subpoenas be issued only with the approval of a majority of the Board. A separate provision required voluntary compliance by Federal agencies with requests for information from the Board.

[101] The Shays/Maloney companion bill, H.R. 5040 was introduced in the House and referred to 10 committees.

> is not an acceptable price for greater security. We must find a way to balance the two, and this is what this bill proposes to do. It creates a Privacy and Civil Liberties Board * * * to analyze * * * the enhanced security measures taken by our government and to ensure that civil liberties are appropriately considered as these policies are developed.[102]

The enhanced security authority vested in our government in the aftermath of 9/11 is unprecedented and necessarily broad. Virtually every postmortem evaluation of the incidents leading up to the terrorists attacks on September 11, 2001 has identified improvement in the government's ability to share information as the most urgent task to combat and prevent acts of terrorism in the future.[103] As a result, key changes have been proposed and/or implemented to ease the flow of information among government entities at every level within the United States, the private sector, and certain foreign governments.[104] In addition, the 9/11 Commission also made recommendations that would expand collaboration with and among government and the private sector.

Interestingly, almost simultaneously with the markup of H.R. 10, a U.S. District Court judge found the FBI's use of a "national security letter" unconstitutional because it allows the FBI to demand customer information from Internet service providers without judicial oversight or public review. In the course of analyzing the constitutionality of the FBI's use of a national security letter ("NSL"), the court distinguished between NSL's and administrative subpoenas. "Ordinary administrative subpoenas," the court observed, "may be issued by most federal agencies, as authorized by the hundreds of applicable statutes in federal law."[105] But, "[u]nlike the NSL statutes, most administrative subpoena laws either contain no

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[102] Congressional Record, S8866 (Sept. 7, 2004).

[103] See Markle Foundation, Task Force on National Security in the Information Age, Protecting America's Freedom in the Information Age (2002).

[104] Several of the provisions in the USA PATRIOT Act that are set to expire next year implicate privacy interests and civil liberties. For example, subsection 203(b) grants law enforcement officials authority to share electronic, wire, and oral interception information with intelligence, protective, immigration, national defense and national security officials. Subsection 203(d) allows the sharing of foreign intelligence and counterintelligence information as well. Others ease the burden on government to acquire personal information in the first instance. For example, section 209 relaxes the standard required by some courts prior to 9/11 for seizing voice mail messages. By treating voice mail like e-mail, section 209 permits its seizure by search warrant as opposed to the more demanding wiretap order previously held to apply. Similarly, sections 212 and 217 permit easier government access to electronic communications with the assistance of service providers.

For example, existing programs designed in whole or in part to target terrorist travel include the Terrorism Information Awareness (TIA), the Computer Assisted Passenger Prescreening System (CAPPS), the Multi-State Anti-Terrorism Information Exchange (MATRIX) Pilot Project, and the United States Visitor and Immigrant Status Indicator Technology program (US–VISIT). A recent Congressional Research Service report notes that "[t]hese programs necessarily require enhanced information sharing by government agencies and the private sector, and are designed to assist the information needs of intelligence and national security. * * * [Nevertheless, w]hile the benefits from the use of advanced technologies for antiterrorism efforts are clear, the risks to individual privacy and the potential for abuse and harm to individual liberty by Government officials and employees deploying such technologies are equally established." Congressional Research Service, USA Patriot Act Sunset: Provisions That Expire on December 31, 2005 7 (Aug. 2004).

[105] Doe v. Ashcroft, 2004 WL 2185571 (S.D.N.Y.) (Sept. 28, 2004), at 8. "For example, the Internal Revenue Service (IRS) may issue subpoenas to investigate possible violations of the tax code, and the Securities Exchange Commission (SEC) may issue subpoenas to investigate possible violations of the securities laws. More obscure examples include the Secretary of Commerce power to issue subpoenas in investigating and enforcing halibut fishing laws." Id. (citations omitted).

provision requiring secrecy, or allow only limited secrecy in special cases." [106]

Thus, at the same time a court determined that the government's use of information gathering tools unconstitutionally encroaches on the Bill of Rights, this Committee denies the civil liberties watchdog authority to obtain relevant information from those to whom such substantial power has been vested. This approach is flawed for several reasons. First and most important, one need only look to the experience of the very Commission from which the recommendation to establish a civil liberties board emanates; simply put, without its subpoena powers, which extended to the federal government, the 9/11 Commission could not have accomplished its charge.[107]

Second, on August 27, 2004, the President issued Executive Order 13353, establishing the "President's Board on Safeguarding Americans' Civil Liberties." The E.O. 13353 board clearly is an advisory board designed to assist the President and his Administration in developing and implementing homeland security functions that may have an impact on civil liberties. The board consists exclusively of Administration insiders and, while admirable, cannot perform the vitally important task of the government wide civil liberties board as conceived by the 9/11 Commission. Yet, the Executive Order authorizes the President's board to "obtain information and advice relating to the Policy from representatives of entities or individuals outside the executive branch of the Federal Government." Moreover, the Executive Order expressly authorizes the Board to "establish one or more committees that include individuals from outside the executive branch of the Federal Government * * * to advise the Board on specific issues * * * [and] carry out its functions separately from the Board." Ironically, H.R. 10 as amended establishes a civil liberties board that has no designated authority to obtain any information from any person or entity outside the federal government. As such, the President's advisory board has broader authority to obtain information from the private sector than the civil liberties board.

Finally, while Congress must ensure that the executive branch has the tools and resources necessary to protect the American people from further terrorists attacks, we must also ensure that the constitutional rights and liberties of all persons in the United States are not violated. The creation of a strong, oversight board consistent with that proposed by the 9/11 Commission will go a long way in safeguarding those liberties. The new relationships that will be and have been forged between government and the private sector require parallel oversight authority to ensure that those relationships are properly tailored to reconcile the security of our nation and the liberty of our citizens. We believe that there must be a mechanism in place that permits the civil liberties board to exist as an effective check and balance. The administrative subpoena is essential to fulfill this objective.

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[106] Id. at 9.

[107] See 9/11 Commission Says U.S. Agencies Slow Its Inquiry, N.Y. Times, July 9, 2003; 9/11 Commission Could Subpoena Oval Office Files, N.Y. Times, Oct. 26, 2003; Mayor Agrees to Allow Panel to Examine Sept. 11 Records, N.Y. Times, Dec. 4, 2003.

III. The Legislation Contains Civil Liability Provisions That Would Harm Terror Victims and Fail To Enhance Security

We also are concerned that the legislation contains numerous civil liability measures that would do little, if anything, to enhance our security; their only effect would be to diminish the rights of terror victims. Section 5103 allows states and localities to enter into litigation management agreements to handle all claims arising out of, relating to, or resulting from an act of terrorism. These agreements provide for a federal cause of action for claims against emergency response providers, and the federal court is to apply the law, including the choice of law principles, of the state in which the terrorist act occurred. This would be an acceptable response to terrorism-related injuries if the drafters had stopped there. Unfortunately, section 5103 overreaches by going outside the scope of the 9/11 Commission report to protect bad actors.

First, section 5103, contrary to other immunity protections given to volunteers, protects emergency responders for intentional bad acts. Although language in this section specifically states that it does not apply to any person or government entity that knowingly commits either an act of terrorism or a criminal act related to or resulting from an act of terrorism, the bill's liability restrictions would apply to persons who commit intentional torts. For example, a nurse who decides that a victim's injuries are so serious that the patient would be better off dead than alive would be immune from liability if she deliberately administered a drug into an intravenous line that killed the victim. Similarly, an emergency responder who commits a hate crime or crime of violence in the immediate aftermath of a terrorist attack would face no accountability for her actions. Finally, if a firefighter or police officer responding to an emergency while intoxicated strikes and kills a pedestrian en route, this bill would insulate him from liability.

The House consistently has rejected giving protections to intentional bad actors [108] and that policy should not be abdicated just because an act of terrorism is involved. Most, if not all, intentional misconduct is criminal. To exempt criminal misconduct caused by terrorism from the scope of the bill's protection, but not other criminal misconduct, such as assault, battery, or vehicular homicide, is unprecedented and simply bad policy.

For example, just because a terrorist act occurred does not mean that responders should get away with reckless or intentional misconduct that causes injury, such as if a paramedic responding to a terrorism emergency recklessly gives a patient a drug to which the patient is allergic even though the patient is wearing a medical alert bracelet stating the allergy. In the case of an emergency room physician treating the pelvic injuries of a pregnant woman injured during a terrorist attack, the physician could sterilize her without

[108] For example, the Volunteer Protection Act, Pub. L. 105–19, protects volunteers from negligence claims, but allows them to be held accountable for intentional misconduct. According to House Report 105–101, volunteers can only receive these protections if "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer." Moreover, the House recently passed H.R. 1787, the "Good Samaritan Volunteer Firefighter Assistance Act" and H.R. 1084, the "Volunteer Pilot Organization Protection Act." Neither of these Good Samaritan measures protects donors of firefighting equipment or volunteer pilot organizations who fly for the public benefit from intentional torts.

her permission and be immune from punitive damages. The mere fact that an emergency worker is responding to an act of terrorism does not mean that the responder is entitled to commit criminal acts that jeopardize public safety and health.[109]

The legislation aggravates this problem by reducing the compensation victims could recover. It first eliminates punitive damages. Although rarely awarded, punitive damages punish the wrongdoer for conscious, flagrant disregard for the health and safety of others and deter other bad actors from committing future bad acts. In the area of emergency medicine, emergency response personnel could be subject to punitive damages for intentionally failing to respond to an emergency, assaulting or sexually abusing a victim, or other criminal acts, including civil rights violations. It is very important to hold wrongdoers who act with the intention to harm accountable for the injuries that they cause. By both including intentional torts in the scope of these litigation management agreements and simultaneously eliminating the possibility of punitive damages, section 5103 delivers a one-two punch that makes it difficult, if not impossible, to deter criminal misconduct and ensure public safety.

The bill further contains a collateral source provision also designed to reduce compensation.[110] Essentially, this language would allow the wrongdoers to benefit from a victim's prudent investment of insurance. Why should a victim's health or life insurer pay for the victim's injuries before the wrongdoer pays even a dime? And, is it fair for the victim's employer to pay unemployment or disability benefits before the wrongdoer is held accountable? Wrongdoers should not profit from a victim's preparedness in planning for the unforeseen, and the wrongdoer should not be the last to be held responsible for a victim's injuries.

Indeed, it is somewhat shocking that this bill would require everyone other than the wrongdoer to pay for a victim's injuries. Under this language, one could even have the preposterous result of having the collateral sources—such as the victim's health insurer and the victim's employer—paying the entire amount of damages owed while the wrongdoer pays nothing. Similarly, this provision would shift the burden from the wrongdoer to the government if the victim receives Medicare, Medicaid, Social Security disability or retirement benefits, or any other type of government support. The Majority rejected Minority efforts to protect the rights of victims to be fully compensated for their injuries.[111]

The bill would appear to unconstitutionally extend tort immunity to non-governmental entities, giving private emergency response personnel, including private hospitals and their employees, liability protections.[112] Interpreting the Eleventh Amendment to the Con-

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[109] During the markup, Rep. Watt (D–NC) offered an amendment to remove intentional torts from the scope of section 5103 in order to keep this bill consistent with other measure providing liability protections. The Majority rejected the amendment by a vote of 12–19.

[110] Section 5103 states that "any recovery by a plaintiff * * * shall be reduced by the amount of collateral source compensation * * * that a plaintiff has received or its entitled to receive as a result of * * * [an] act[] of terrorism.

[111] An amendment by Rep. Bobby Scott (D–VA) to strike the punitive damage exception and the collateral source rule was defeated by a vote of 12–19.

[112] Under section 5104, the definition of "emergency response provider" permits private, non-governmental entities to be parties to a litigation management agreement and thus receive the same liability protections as state or local government actors.

stitution, the Supreme Court has consistently held that the immunity given to federal and state governments cannot be easily transferred to private, non-governmental actors. Extending such protection is subject to the principle of the Court's "state-action doctrine" (as well as the collateral doctrine of "federal action").[113] Under the state-action doctrine, private entities must be actively supervised by the "state" in order for sovereign immunity to attach; it is not enough for a private actor, such as a private hospital or emergency room employee, to be certified or licensed by the state. In this case, the bill fails to ensure that only adequately supervised private entities receive immunity. Even though the immunity protection provided in H.R. 10 to private actors are thus unconstitutional, the Majority defeated an attempt to strike it.[114]

Unfortunately, the Majority rejected every attempt to correct the flaws in the litigation reform provisions of H.R. 10. Taken together, these provisions will have no effect in reducing the Nation's susceptibility to terrorism; they do not secure our ports or make it easier to detain terrorists. These tort reform measures illustrate clearly the overreach of the Majority's so-called "9/11 Commission Recommendations Implementation Act;" the 9/11 Commission did not call for tort reform and neither should we.

CONCLUSION

The attacks of September 11 were tragic events that brought the Nation together. Members of Congress stood shoulder to shoulder on the steps on the Capitol singing "God Bless America." Democrats in Congress united behind the President's efforts in the war on terror. This Committee worked together to craft a version of the USA PATRIOT Act that passed unanimously.

Unfortunately, where some saw an opportunity for national unity, others saw the opportunity for partisan political gain. Despite widespread public and congressional support for the unanimous and bipartisan recommendations of the 9/11 Commission, the Republican leadership authored legislation that would subject persons to torture, eliminate the judicial review of executive branch actions, permit government intrusion into our daily lives, and divert compensation away from terror victims. Congress owes the American people better than this. For these reasons, we dissent.

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[113] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)) (the concept of sovereign immunity under our constitutional system dictates that the immunity policy must be "'one that clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised by the State Itself.'"). These cases illustrated the point in the context of Sherman Act antitrust suits. The Court examined whether private actors were acting as "the state" to a point sufficient to make their anti-competitive conduct immune from the Sherman Act. Applying the above test, the Court determined that because the State was not actively involved in closely supervising the activities of the private actor, that actor could not be immune from federal law.

[114] An amendment by Rep. Scott to strike the broad grant of immunity was defeated by a vote of 12–19. This amendment was combined with an amendment to strike the limits on monetary recovery.

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ADDITIONAL DISSENTING VIEWS

We dissent from H.R. 10 because we also believe the legislation demonstrably fails to provide the needed resources to combat and respond to terrorism.

The 9/11 Commission could not have been any more clear about how homeland security assistance should be allocated: "Federal homeland security assistance should not remain a program for general revenue sharing. It should supplement state and local resources based on the risks or vulnerabilities that merit additional support. Congress should not use this money as a pork barrel."

After September 11th, the Bush administration set up two major programs to provide funding for local law enforcement agencies working to provide homeland security. The first of these programs, established for fiscal year 2003, is the State Homeland Security Grant program. In direct contradiction of the 9/11 Commission's recommendation, 40% of these funds are distributed to states as "minimum guarantees." The remainder is distributed not on the basis of threat, as recommended by the Commission, but rather on the basis of population. And just as the Commission complained, the result is that funding is not targeted to places like New York, Washington, Los Angeles, and other areas desperate for assistance.

Because the State Homeland Security Grant Program does not distribute money on the basis of threat, Congress set up a separate stream of homeland security funding for local law enforcement targeted directly for urban areas. Originally called the "high threat, high density" program, and later entitled, the "Urban Area Security Initiative," UASI provides funding based on a formula kept largely secret by the Department of Homeland Security. But because the Department of Homeland Security has decided to open up the program to more and more localities—initially only seven cities were eligible; at last count 80 cities and transportation agencies were receiving UASI funds—allocations for jurisdictions at the greatest risk have been shortchanged again.

H.R. 3266, the bill written by the Select Committee on Homeland Security, took important strides in implementing the 9/11 Commission's recommendations. It combined the two existing programs, eliminated the minimum guarantee, and ensured that funding would be distributed exclusively on the basis of threat. Incorporated as a part of the Republican 9/11 bill, H.R. 10, the Judiciary Committee veered away from the Commission's recommendations, even as Democrats made substantive improvements to the bill.

Committee Democrats made the following improvements:

Terrorism Cops eligible for funds. Under an amendment crafted by Rep. Anthony Weiner, Rep. Jerrold Nadler, and Rep. Nita Lowey, jurisdictions will be eligible to apply for federal funds to cover the salaries of police officers whose work is devoted exclusively to counterterrorism and intelligence.

Past expenditures eligible for funds. Under an amendment authored by Rep. Anthony Weiner and Rep. Jerrold Nadler, jurisdictions will be eligible to apply for federal funds to recoup past homeland security expenditures not already covered by the federal government.

Threat funding follows the threat. Under an amendment offered previously by Rep. Weiner and Rep. Nadler and included in the bill, the Department of Homeland Security will place the greatest emphasis on threat when disbursing homeland security funds. The current formula weighs population and infrastructure more heavily than threat, helping places like Wyoming, but hurting New York City.

Fake police badges loophole closed. An amendment offered by Rep. Weiner closed a loophole in the law that bans the use and sale of fake police badges. Previous law allowed exceptions for people who used badges for "decorative" or "recreational" purposes. Rep. Weiner's amendment will strip those loopholes from the law.

Additionally, Democrats were able to include language that authorizes the C.O.P.S. program. Like legislation included in this year's Department of Justice Reauthorization Bill, an amendment by Rep. Weiner reauthorizes the C.O.P.S. program through 2007, including language that would allow COPS funding to be used to pay for officers involved in religious, anti terror, or homeland security duties.

Unfortunately, committee Republicans insisted on deviating from the 9/11 Commission's recommendation. Despite Chairman Cox's best efforts to reign in his colleagues, Republicans have boosted the minimum guarantee states receive to .25 for all states, and .45 for all states with an international border. Committee Republicans defeated an amendment by Rep. Nadler to return to the Commission's recommendation by striking the minimum. And then, in an effort simply to guarantee that high risk areas getting the funding they need, Rep. Weiner offered an amendment to add a minimum guarantee of 8.5%—as much as $289 million under the authorization included in the original Cox bill—for jurisdictions like New York that "are consistently referenced in intelligence information as a terrorism target, or have previously been the site of more than one terrorism attack." That too was defeated by the committee Republicans.

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